SUPREME COURT OF KENTUCKY
NO. _____

PURDUE PHARMA L.P., PURDUE PHARMA, INC., THE PURDUE FREDERICK COMPANY, INC. D/B/A THE PURDUE FREDERICK COMPANY, PURDUE PHARMACEUTICALS L.P., AND THE P.F. LABORATORIES, INC. — MOVANTS

v.

BOSTON GLOBE LIFE SCIENCES MEDIA, LLC D/B/A STAT, COMMONWEALTH OF KENTUCKY EX REL ANDREW BESHEAR, ATTORNEY GENERAL, ABBOTT LABORATORIES, AND ABBOTT LABORATORIES, INC. — RESPONDENTS

MOTION FOR DISCRETIONARY REVIEW

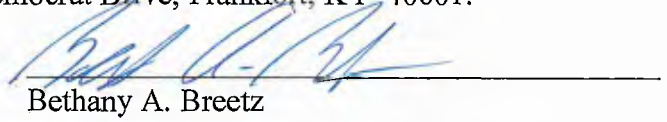
Daniel E. Danford
STITES & HARBISON, PLLC
250 West Main Street,
Suite 2300
Lexington, KY 40507
Telephone: (859)226-2292

Bethany A. Breetz
STITES & HARBISON, PLLC
400 West Market Street,
Suite 1800
Louisville, KY 40202
Telephone: (502) 681-0634

Trevor W. Wells
REMINGER CO LPA
2100 North Main Street
Suite 202
Crown Point, IN 46307
Telephone: 219-323-2060

Certificate of Service

I hereby certify that copies of this motion were sent by first-class mail, postage prepaid, January 14, 2019, to: Jon L. Fleischaker, Kaplan Johnson Abate & Bird, LLP, 710 W. Main Street, Louisville, KY 40202; S. Travis Mayo, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601; C. David Johnstone, LeeAnne Applegate, and Michael Edward Brooks, Office of the Attorney General, 1024 Capitol Center Drive, Suite 200, Frankfort, KY 40601; Donald L. Smith, Jr., Pruitt De Bourbon Law Firm, 131 Main Street, Pikeville, KY 41501; Tyler Thompson and Anthony Ellis, Dolt, Thompson, Shepherd & Kinney, PSC, 13800 Lake Point Circle, Louisville, KY 40223; Susan J. Pope, Frost Brown Todd LLC, 250 W. Main Street, Suite 2700, Lexington, KY 40507; Bayard V. Collier, Boehl, Stopher & Graves LLP, 137 Main Street, Suite 200, P.O. Box 11239, Pikeville, KY 41502; Hon. Steven D. Combs, Pike Circuit Court, 146 Main Street, Pikeville, KY 41501; and Samuel P. Givens Jr., Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



Bethany A. Breetz

PRELIMINARY INFORMATION REQUIRED BY RULE 76.20(3)

A. Movants, Purdue Pharma, L.P., Purdue Pharma Inc., The Purdue Frederick Company, Inc. d/b/a The Purdue Frederick Company , Purdue Pharmaceuticals L.P., and The P.F. Laboratories, Inc. (collectively "Purdue") are represented by Daniel E. Danford, STITES & HARBISON, PLLC, 250 West Main St., Suite 2300, Lexington, KY 40507; Bethany A. Breetz, STITES & HARBISON, PLLC, 400 West Market St., Suite 1800, Louisville, Kentucky 40202; and Trevor W. Wells, REMINGER CO LPA, 2100 North Main St., Suite 202, Crown Point, IN 46307.

B. Boston Globe Life Sciences Media, LLC d/b/a STAT is represented by Jon L. Fleischaker, Kaplan Johnson Abate & Bird, LLP, 710 W. Main Street, Louisville, KY 40202. The Commonwealth of Kentucky is represented by S. Travis Mayo, Office of the Attorney General, 700 Capital Ave., Suite 118, Frankfort, KY 40601; C. David Johnstone, LeeAnne Applegate, and Michael Edward Brooks, Office of the Attorney General, 1024 Capitol Center Dr., Suite 200, Frankfort, KY 40601; Donald L. Smith, Jr., Pruitt De Bourbon Law Firm, 131 Main St., Pikeville, KY 41501; Tyler Thompson and Anthony Ellis, Dolt, Thompson, Shepherd & Kinney, PSC, 13800 Lake Point Circle, Louisville, KY 40223. Abbott Laboratories and Abbott Laboratories, Inc. are represented by Susan J. Pope, Frost Brown Todd LLC, 250 W. Main Street, Suite 2700, Lexington, KY 40507, and Bayard V. Collier, Boehl, Stopher & Graves LLP, 137 Main Street, Suite 200, P.O. Box 11239, Pikeville, KY 41502.

C. Purdue seeks review of the Court of Appeals' 72-page To-Be-Published December 14, 2018 Opinion (Tab 1). No petition for rehearing or motion for reconsideration is pending.

PRIMARY REASON TO GRANT DISCRETIONARY REVIEW

This appeal concerns access to confidential discovery documents that were sealed in the record pursuant to a protective order entered by the trial court for good cause. Months after the case settled, STAT sought access to the sealed discovery documents even though they played no role in any substantive adjudication. The trial court ignored governing precedent from this Court and improperly granted STAT's motion, primarily due to an opinion from the Court of Appeals that misapplies this Court's holdings. On appeal, the Court of Appeals provided a treatise on its view of Kentucky's common law and its interpretation of this Court's opinions (re-writing the common law in the process), while saying practically nothing about protective orders and their impact on the common law. The Opinion guts litigants' ability to rely on protective orders and retroactively strips protective orders of any role in litigation, particularly when a governmental entity is a party. The bench and the bar need guidance regarding the impact of protective orders on motions to unseal court records, and the procedure to employ when such motions are made.

STATEMENT OF MATERIAL FACTS

1. Suit is filed, and the parties negotiate, and the trial court enters, a protective order.

The underlying case was filed in 2007 by the Commonwealth and Pike County, alleging that the marketing and promotion of OxyContin® caused "excessive" Medicaid spending on OxyContin and required monies to be spent addressing problems attributable to OxyContin abuse. Purdue removed the case to federal court, where it was included in multidistrict antitrust litigation, before being remanded in 2013. Pike County subsequently settled its claims.

In late 2013, the remaining parties began discovery. The magnitude of the claims made it evident that discovery would be far-reaching, with massive document production. Finding "good cause" and that "a protective order is necessary in this case to protect the confidentiality of documents ... produced during discovery," the trial court entered a Protective Order that allowed the parties to designate confidential documents and required sealing of court filings containing or attaching such materials. Purdue alone produced over 17 million pages.

2. Purdue produces voluminous documents in reliance on the Protective Order.

Protective orders are enormously important in complex litigation because they allow for a free exchange of information while protecting sensitive and confidential information. Here the Protective Order allowed the Commonwealth to obtain all the information it desired without encountering valid objections to production of confidential information. Without it, Purdue would not have voluntarily produced confidential materials and witnesses for deposition, which would have guaranteed significant motion practice. For example, Purdue agreed to the Kentucky deposition of Dr. Richard Sackler, a Purdue board member, instead of refusing and litigating the propriety of a subpoena in Dr. Sackler's home state. The tangible benefits of the Protective Order in this case—a streamlined discovery process, an expansive amount of discovery, and a small number of discovery battles—illustrate the importance of protective orders. In reliance on

the Protective Order, Purdue produced millions of pages of documents, which included trade secrets and confidential marketing materials, business information, documents submitted to the FDA (including the chemical composition of OxyContin), strategies and personnel actions, and settlement communications from an earlier criminal case—the type of information routinely subject to protective orders.

The following documents were filed under seal pursuant to the Protective Order:

The Sackler Deposition: Dr. Sackler was deposed in August 2015. Without notice to the parties, the court reporter filed a non-final version under seal in September 2015. Purdue did not know it had been filed until STAT moved to intervene.[1] The transcript was not an exhibit to any motion or referenced in any dispositive motion, and it had no role in any decision in the case.

Routine Discovery Motions: The bulk of the sealed documents are motions to compel with exhibits. Only one was actually decided by the court on the merits, and after Purdue produced documents in accord with the court's order, the issue had no further impact on the case. Another motion to compel was held in abeyance and was never heard or decided. The remaining motions were never ruled upon, most were not even fully briefed, and none were argued.

Summary Judgment Exhibits: In April 2014, the Commonwealth moved for partial summary judgment, arguing that it was entitled to judgment as a matter of law because of requests for admission that the court had earlier deemed admitted. In over 400 pages of briefing (excluding exhibits), Purdue's response attached one sealed exhibit, and the Commonwealth's sealed reply attached a handful of confidential exhibits listed in footnotes 10 and 16 to the reply.

Purdue sought relief under CR 36.02 from the order deeming the requests admitted. After the trial court denied that relief, Purdue sought a writ. The trial court then held the partial

[1] The Commonwealth earlier took the deposition of another Purdue witness, but, as expected, that different court reporter returned the transcript to the parties. No one filed that deposition.

summary judgment motion in abeyance until the appeal from the writ action was final. While the Court of Appeals denied the writ, its "judicial conscience" could not "ignore that a legitimate question [wa]s presented whether the deadline passed for responding to" the admissions, and "it would seem judicially economical and expedient to grant the writ and resolve the issue." *Purdue Pharma L.P. v. Combs*, 506 S.W.3d 337, 342 (Ky. App. 2014). Purdue appealed to this Court.

The case settled on December 16, 2015. By that point, oral argument had been held before this Court in March 2015, and a ruling on the pending writ appeal appeared imminent. The Commonwealth insisted on having the writ appeal abated pending a final settlement agreement and dismissal of the case. A motion, response, and order abating the writ appeal were all filed or entered in this Court the day before the December 17, 2015 rendition day.[2]

The trial court held the partial summary judgment motion in abeyance throughout the writ appeal, and it was thus never heard or decided. Nor were Purdue's December 2015 motions for summary judgment—which were never fully briefed—ever heard or decided. Neither party mentioned the Sackler deposition—which was completely irrelevant to any issues in any of the dispositive motions—in that summary judgment briefing. None of the discovery documents at issue in this appeal were ever presented to Judge Harris (sitting by designation during Judge Combs's absence) for consideration with the subsequent agreed judgment.

3. Judge Harris enters an Agreed Judgment settling the case and maintaining the confidentiality of discovery documents, including those at issue.

Maintaining confidentiality of the parties' confidential information was so vital that it was made a material part of the Settlement Agreement. It specified that the Protective Order

[2] The lower courts ignored the imminent ruling on the pending appeal as an impetus for settlement, even though granting of the writ would have significantly changed the Commonwealth's case against Purdue. Instead, those courts speculated that the filing of the Sackler deposition (which filing Purdue did not even know about at the time) or summary judgment briefing (which was being held in abeyance), or some sort of possible "future issue preclusion" led to settlement. (Tab 1 at 6, 7; Tab 2 at p. 3.)

remained in full force, and the Settlement Agreement separately required the parties not to disclose confidential documents.

The parties emailed the settlement papers to Judge Harris mid-day during his Christmas vacation. He reviewed them in his Knott County office and signed the Agreed Judgment the next morning.[3] On December 22, 2015, Judge Harris entered judgment approving and adopting the Settlement Agreement, thereby approving the continued sealing of the confidential discovery documents filed in the record. Despite the Court of Appeals' mistaken belief to the contrary (Tab 1 at 66), the Settlement Agreement was filed in the record and was not sealed. It was and is open to anyone who cares to review it. No one sought any of the sealed documents at that time.

4. Months after the case is settled, STAT seeks to intervene.

Months later, STAT sent the Commonwealth an open records request for Dr. Sackler's deposition transcript, which the Attorney General properly denied. In March 2016, STAT moved to intervene and unseal, claiming that the documents were filed under seal without a supposedly required hearing and "without any of the other required procedures or findings necessary to seal court records." In other words, although neither STAT nor anyone else objected to entry of the Protective Order (a public document) at the time it was entered or for years afterward, STAT claimed a hearing was required before any documents in the record could be sealed pursuant to that Order.

While only specifically identifying Dr. Sackler's deposition, the motion also sought to unseal an "unknown number" of other sealed documents. STAT mistakenly argued that the

[3] The undisputed facts regarding Judge Harris's signing of the agreed order were included in Purdue's briefing in this matter. Following questioning during oral argument, and in light of this Court's then recent opinion in *Rigdon v. Commonwealth*, 522 S.W.3d 861 (Ky. 2017), Purdue moved to supplement the record with those emails that Judge Harris had not made part of the record (Tab 5), which motion was denied with no reasons given. (Tab 6.) Guidance is needed on what parties should do when emails with the trial court that were, or become, relevant were omitted from the record.

Sackler deposition: (1) was "a basis for the Court's exercise of judicial power in the numerous summary judgment motions pending before the Court" at the time of the settlement; and (2) "played an additional and significant role in the Court's exercise of judicial power in this case." In fact, the Sackler deposition was never mentioned in any summary judgment motion and played no role in any adjudication by the trial court.

Purdue did not oppose intervention, but vigorously opposed the request to unseal Dr. Sackler's deposition and the other documents because they were sealed pursuant to a valid protective order and not involved in any adjudication of the litigants' substantive rights and thus were not subject to the common law right of access.

5. The trial court grants STAT's motion.

Following a hearing, Judge Combs (who had returned to the bench) ruled that the common law right of access applies to all the sealed discovery documents and required them to be unsealed. (Tab 2.) The Sacker deposition, which was filed in the record due to CR 30.06, is just like the discovery material addressed in *Courier-Journal, Inc. v. McDonald-Burkman*, 298 S.W.3d 846, 848-49 (Ky. 2009), where this Court held that the filing of discovery documents in the record due to a local rule did not make them "judicial document[s] subject to the right of public access." But the court did not apply *McDonald-Burkman.* Instead, determining that the discovery documents were subject to a common law presumption of openness, the court relied on *Fiorella v. Paxton Media Group,* 424 S.W.3d 433, 441 (Ky. App. 2014), in which the Court of Appeals held that, because the discovery the parties had sealed (without entry of a protective order) could possibly have been a factor in the decision by governmental entities to settle, "the mere possibility that the court considered the information . . . militates in favor of public access."

6. The Court of Appeals affirms, changing Kentucky law in the process.

The Court of Appeals affirmed the trial court, significantly changing Kentucky law in the

process. The Opinion spends about 62 pages discussing the common law from 1803 to the present, explaining and interpreting opinions from this Court and its predecessor (as well as other courts). (Tab 1 at 8-70.) It reaches the conclusion that Kentucky common law is unique from all other common law and that, apparently, all documents filed in a Kentucky court record—regardless of type, use to which they are put, or existence of protective orders—have a "*Kentucky* common law presumption of the public's right to access court records." *Id.* at 15.

The Opinion fails to acknowledge that protective orders are now common in complex litigation and specifically allowed by Kentucky rules. Just as the enactment of Kentucky's Open Records Act impacted the common law regarding access to public records, the 1971 enactment of a civil rule allowing protective orders and the filing of sealed materials in the record pursuant to a valid protective order, necessarily impacted the common law access to court records. Yet, while the Opinion uses the phrase "protective order" seven times—six times referring to the Protective Order in this case and one time quoting *Fiorella* for the proposition that CR 26.03 empowers the trial court to protect parties "by issuing a protective order denying public access to discovery filed with the court"—the Opinion never addresses how protective orders impact the common law presumption of access.

The Opinion reinterprets and, in the process, eviscerates this Court's holdings in *Roman Catholic Diocese of Lexington v. Noble,* 92 S.W.3d 724 (Ky. 2002) (*Noble I*), and *McDonald-Burkman*, in which this Court specifically addressed the issue here: access to documents filed in the judicial record. The Opinion labels *Noble I* "confounding" and asserts that its primary focus is courts' power under CR 12.06 (motions to strike). (Tab 1 at 32-26.) But, in fact, this Court devoted more space in *Noble I* to the common-law right of access to court records than to a court's power to strike documents. More importantly, while searching "for a workable standard" and after addressing "practical, real world considerations," this Court held in *Noble I* that the

"sliding scale of *Amodeo II*" (*U.S. v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995)) "represents the best approach in determining the weight to give the presumption of access" to court records, which "must be governed by the role of the material at issue in the exercise of" judicial power and the "value of such information to those monitoring the courts." 92 S.W.2d at 732. Under this Court's sliding scale standard, "Documents and records that play a great role in determining the substantive rights of parties are afforded the greatest weight," while "[t]hose that play only a 'minor or negligible role in adjudicating the rights of the litigants are accordingly offered little weight." *Id.* The Opinion, however, calls this sliding scale standard "dicta" and downplays it into virtual non-existence. (Tab 1 at 37-56.)

The Opinion's sidelining of *McDonald-Burkman* is also wrong. That case is closely analogous to the case here, especially with regard to the Sackler deposition. The Opinion discounts what *McDonald-Burkman* actually says and relies upon what the Court of Appeals thinks this Court meant to say or should have said. (Tab 1 at 60-63.) In *McDonald-Burkman*, the media sought access to discovery documents that were required to be and were filed in the court record due to a local rule.[4] This Court affirmed the denial of access and the sealing of the discovery documents in the record.

In ruling on the lack of a constitutional right of access in *McDonald-Burkman*, this Court held, "Historically, discovery materials were not available to the public or press," and discovery "is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation." 298 S.W.3d at 848. In response to the media's claim

[4] That Jefferson County local rule requiring the Commonwealth to file criminal discovery in the record has since been eliminated. CR 30.06, which requires court reporters to file depositions in the record, is similar to that former rule and has been abrogated by local rule in numerous counties. The similarity between the local rule and the anachronistic CR 30.06 highlights that the *McDonald-Burkman* rule should apply to all depositions filed pursuant to CR 30.06 and that depositions that would not be public in some counties should not be public in any county.

that, "because the discovery documents are filed with the court as required under local rule, they become court records and immediately open to the public," this Court unequivocally "disagree[d]. The fact that the documents are in the custody of the court does not change the[ir] character," and the "documents themselves contain no evidentiary value until admitted into evidence during trial or other proceedings." *Id.* at 848-49. Public pretrial access to discovery material "would actually hamper the administration of justice." *Id.* at 849.

Turning to the common law right of access, this Court recognized that the common law generally presumes that "criminal and civil actions should be conducted openly" and includes "the right to inspect and copy *public* records and documents." *Id.* (emph. added). Documents accessible under this common law right ("public records") may, however, be sealed. *Id.* This Court went on to reiterate its "sliding-scale approach" from *Noble I* to "determine how much weight to give the presumption of access to court documents and records." *Id.* This Court then relied heavily on *Amodeo II* in establishing the sliding-scale approach and quoted from *Amodeo II* regarding the fact that some documents have no presumption of access:

> Documents that play no role in the performance of Article III functions, *such as those passed between the parties in discovery,* lie entirely beyond the presumption's reach, and "stand on a different footing than a motion filed by a party seeking action by the court," or indeed, than any other document which is presented to the court to invoke its powers or affect its decisions.

Id. at 850, quoting *Amodeo II* (quote cleaned up) (emph. added by this Court). This Court then recognized that "[t]his view is shared among the federal courts *as well*" and cited a number of cases standing for the proposition that "the common law presumption does not go beyond evidentiary materials used in determining the litigants' substantive rights." *Id.* (emph. added). This Court in *McDonald-Burkman* held that the discovery material filed in the record due to a local rule—which had not been used in determining the litigants' substantive rights—was "entirely beyond the [common law's] presumption's reach." This holding is directly applicable

to the Sackler deposition, which was filed in the record solely due to CR 30.06 and was not used in determining the litigants' substantive rights.

The primary Kentucky cases the Opinion relies on as the basis for marginalizing *Noble I* and *McDonald-Burkman* are *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974), and *Central Kentucky News-Journal v. George*, 306 S.W.3d 41 (Ky. 2010). According to the Opinion, the principles of *St. Matthews* govern, *id.* at 31, 36-37, 42, 47-48, 49, 50, 54, 60, 63, 66-69, 71, and *St. Matthews* trumps far more applicable cases decided in the four decades since its rendition. The main difference between *St. Matthews* and this appeal is that *St. Matthews* concerns access to *municipal* records and largely turns on an issue of standing. The opinion in *St. Matthews* changed the previous common law requirement that, to inspect records, the person must be able to prove an interest in them sufficient to "enable him to maintain or defend an action for which the documents or records sought can furnish evidence," to " a purpose which tends to advance or further a wholesome public interest or legitimate private interest." *Id.* at 813, 815. The Court held that its decision "will remove the impediment of lack of interest in many cases but may serve to focus attention on *what constitutes a public* record." *Id.* at 816 (emph. added). Here, STAT's standing is not at issue. At issue is whether discovery filed in *court* records is *public* and, if so, the proper presumption and test for public access. *St. Matthews*, which concerns access to a *city's public* records and right to monitor a *city's* actions, simply does not answer the questions here concerning access to discovery in court files.

George concerns settlement agreements with school boards (public agencies).[5] Although Kentucky's Open Records Act made the settlement agreements public records, the trial court

[5] The Opinion relies on the parties' briefs to interpret this Court's opinion in *George*. (Tab 1 at 51-56.) Presumably opinions of this Court should speak for themselves, and the arguments made in the briefs should not be used to alter the actual holdings of the opinions. This practice is ripe for guidance as well.

sealed those public records and ordered that the school boards not turn them over in response to open record requests. This Court reversed, "conclud[ing] that the agreements must be turned over pursuant to Kentucky's Open Records Act," *id.* at 45, which applies to public agencies, not to the judicial branch. *Ex parte Farley*, 570 S.W.2d 617, 625 (Ky. 1978) ("the public policy" regarding access to judicial branch records "must be articulated by the courts themselves.") But, despite the Court of Appeals' assertion to the contrary, the Settlement Agreement here was *not* sealed and was *not* made confidential, and it is available through open records requests to the Attorney General and requests to the court clerk. The issue here, unlike *George*, concerns private discovery documents sealed in the court record pursuant to a valid protective order.

Another problem with the Opinion is that it relies upon, and is an extension of, *Fiorella*, which itself misinterpreted Kentucky law and had different facts from those here.[6] In *Fiorella* the documents at issue were not subject to a protective order and had not been sealed via a court order; the discovery documents had simply been filed in a sealed envelope by the parties, without the court's permission to do so. Further, because "[m]uch of the information Fiorella seeks to seal is either alluded to or identified outright in materials she has not asked to be sealed, most of it in her own deposition testimony," there was no justification for sealing. *Id.* at 442. Also, according to *Fiorella,* the documents at issue appeared to have been considered by the trial court in dismissing the case on summary judgment, and thus "played a role in the court's Article III function." 424 S.W.3d at 441-42. But, although the court could "not ignore the fact that the record does not show the case was dismissed as settled, but on the basis of successful summary judgment motion," the court nevertheless accepted the "assertion that the case was" dismissed as settled and opined on the effect of that settlement. *Id.* at 441. It is that dicta stacked upon

[6] The author of the Opinion is the author of *Fiorella.* Discretionary review was not sought in *Fiorella.*

dicta—determinations predicated upon a hypothetical protective order and non-existent settlement—that the trial court relied upon in ruling that the discovery documents here were presumed open and upon which the Opinion reiterates and expands. (Tab 2 at 3; Tab 1 at 65-66.)

While trying to fend off arguments in that case, *Fiorella* created an erroneous, bright-line rule that the sliding scale applies to ***all*** discovery filed in the record. *Fiorella* at 442-43. *Fiorella* should have simply recognized that—under *Noble I* and *McDonald-Burkman*—discovery materials fall on the sliding scale if they were used by the trial court to adjudicate the litigants' substantive rights. Instead, *Fiorella* speculated that *McDonald-Burkman* must have been referring to "discovery material that is never filed," *Fiorella* at 443, even though *Noble I*, *McDonald-Burkman*, and *Amodeo II* all concerned documents *actually filed* in the record. *Fiorella*'s speculation ignores the facts of those cases and renders their holdings surplusage.

Fiorella also wrongly states that *McDonald-Burkman* "continue[d] its analysis by applying the sliding scale analysis." *Id.* at 443. *McDonald-Burkman* never determined that the filed discovery documents belonged on the sliding scale (or which "weight" should apply). Instead, the Court's commentary focused on whether the trial court's ruling would "cause Appellant to suffer 'great and irreparable injury' if the petition is not granted," a necessary inquiry in that writ case. *McDonald-Burkman*, 298 S.W.3d at 850-51. The Court's preface to that discussion—"[h]owever, even if a common law right of access to discovery material exists"—underscores that, having already found that the common law presumption *did not* apply, *McDonald-Burkman* was focused on its writ analysis and did not need or intend to engage in a full sliding scale analysis. *McDonald-Burkman*'s writ analysis supports the conclusion that filed documents with no role in the court's adjudication of substantive rights "lie entirely beyond the presumption's reach," *id.* at 849-50, and does not sanction *Fiorella's* bright-line rule that *Noble I, McDonald-Burkman* and *Amodeo I and II* squarely rejected.

QUESTIONS OF LAW INVOLVED AND REASONS WHY THIS COURT SHOULD GRANT REVIEW

As demonstrated above, this appeal concerns a variety of important and fundamental questions about: (1) what documents filed in the court record are public documents presumptively entitled to public access; (2) the weight of the presumption of access (including whether the weight of the presumption changes depending on the type of document, the purpose for which it was filed in the record, and whether the document was ever actually used for that purpose); and (3) the impact of protective orders on the common law presumption and the weight of that presumption. *Compare Noble I, McDonald-Burkman,* and *Amodeo II* with *Fiorella* and the Opinion. Counsel for Purdue is aware of no Kentucky opinion that addresses the media's access to discovery sealed in the record pursuant to a validly entered CR 26.03 protective order. While that is the precise issue in this appeal, the Opinion fails to discuss the impact of the Protective Order on the sealing of the documents.

Further, the Opinion has rewritten the common law to allow a presumption of access to court documents not just for the purpose of monitoring the courts, but for monitoring any public agency that is a party to litigation. But the Open Records Act allows for monitoring public agencies; the common law presumption of access to *court* records is to monitor the *courts*. *Noble I,* 92 S.W.3d at 732. Under *Fiorella* and the Opinion here, protective orders in cases where a governmental entity is a party are virtually worthless. If a case settles and public funds are paid to or by a governmental entity, then the Opinion holds that public interest virtually necessitates unsealing any sealed documents. Tab 1 at 65-66; *Fiorella,* at 441. And if the case is tried or dismissed on summary judgment and the government wins or loses, then, under the same logic, all sealed documents, regardless of whether they have been entered into evidence or whether they were sealed under a protective order, must be unsealed. These rulings will remove the beneficial certainty that protective orders provide to litigants and will turn the discovery

process for governmental entities seeking sensitive or confidential information into pitched battles over where, whether, and how the discovery is legally obtainable. And parties to concluded litigation who relied on protective orders to keep their documents confidential may now have their discovery documents opened for all to review.

From a broader perspective, if protective orders cannot be relied upon, then discovery is less likely to be ordered to be produced and writs prohibiting discovery are more likely to be sought and granted. *See, e.g., Edwards v. Hickman*, 237 S.W.3d 183, 192 (Ky. 2007) (denying writ of prohibition due, in part, to "extensive confidentiality protection language" in a protective order because any concern about "gaining a competitive advantage through the revelation of the information is alleviated by the stringent confidentiality requirements on most of the material as ordered by the circuit court."). Without such orders, there would be no "adequate vehicle for relief," and the number of writ petitions sought and granted will increase.

In addition, the bench and bar need this Court's guidance as to whether a determination that good cause has been shown for a Protective Order is sufficient for parties to act in accordance with that order, including filing documents under seal. Here, the Protective Order was entered in *2013*, allowing far-reaching discovery without significant motion practice, and no one objected to or raised any issues about it until STAT intervened in *2016*. Without the protective order and the ability to protect confidential documents under seal in the record, the discovery process would have devolved into a contentious unproductive mess that needlessly taxed the resources of the parties and the court.

If the Opinion stands, it would be a backward step in Kentucky litigation and would put an end to the effective use of umbrella protective orders, which, as illustrated by the experience here, are recognized as important in complex cases. *See, e.g., In re Alexander Grant & Co.,* 820 F.2d 352, 356 (11th Cir. 1987) (approving "umbrella" protective orders "in complicated cases

where document-by-document review of discovery materials would be unfeasible" and because "[b]usy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document"). Rather than necessitating a document-by-document review before sealing a large number of documents in a complex litigation such as this one, courts uphold "the use of umbrella protective orders" and do "not permit the media to challenge each and every document protected by the umbrella order," instead allowing the media "only to challenge the umbrella order as being too broad, based on a variety of factors," none of which exist here. *Chicago Tribune v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1316 (11th Cir. 2001) (Black, J. concurring). Courts "have restricted the scope of the media's challenge because a document-by-document approach would not only burden the trial court, but, more importantly, it would interfere with the free flow of information during discovery. . . . Such interference by parties who have no interest in the underlying litigation could seriously impair an Article III court from carrying out its core function—resolving cases and controversies." *Id.* This Court should set public policy, not the Court of Appeals.

As demonstrated above, the Opinion directly undermines this Court's precedent, with a far-reaching impact on Kentucky litigation practice. This Court very carefully sought out and adopted the *Amodeo II* framework for assessing the common law presumption of access to documents sealed in the court record pursuant to a protective order. If that precedent is going to be changed, it is this Court, and not the Court of Appeals, that should do so. This Court should grant discretionary review.

Bethany A. Breetz
STITES & HARBISON, PLLC
400 W. Market, Ste 1800
Louisville, KY 40202

Daniel E. Danford
STITES & HARBISON, PLLC
250 W. Main St., Ste 2300
Lexington, KY 40507

Trevor W. Wells
REMINGER CO LPA
2100 N. Main St., Ste 202
Crown Point, IN 46307

APPENDIX

1276380:3:LOUISVILLE